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Nos. 95-31, 95-258

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

SHANNON RICHEY FAULKNER,

Petitioner/Respondent,

and the

UNITED STATES OF AMERICA,

Respondent,

v.

JAMES E. JONES, JR., *et al.*,

Respondents/Petitioners.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

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MEMORANDUM IN OPPOSITION TO MOTION OF NANCY MELLETTE TO ADD PARTY OR TO INTERVENE

James E. Jones, Jr., The Citadel, the Military College of South Carolina ("The Citadel"), and the State of South Carolina, *et al.*, respondents in No. 95-31 and petitioners in No. 95-258, respectfully submit this memorandum in opposition to the Motion of Nancy Mellette ("Mellette") to Add Party or to Intervene ("Motion"). (The Citadel and South Carolina are both respondents and petitioners before this Court, so we will refer to them herein collectively as "defendants.") Because the Motion is a transparent – and untimely – attempt on the part of the lawyers for Shannon Richey Faulkner ("Faulkner"), petitioner in No. 95-31 and respondent in No. 95-258, to resuscitate Faulkner's moot petition for writ of certiorari, and because the Motion does not in any event meet the standards for the addition or intervention of parties before this Court, the extraordinary relief sought by the Motion must be denied.

STATEMENT

On July 10, 1995, Faulkner filed her petition for certiorari in No. 95-31, seeking review of the "remedial aspect" of the Fourth Circuit's decision in *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (*"Faulkner II"*). Motion at 3. Defendants, who had sought and received an extension of the time within which to file a petition for writ of certiorari, timely filed their petition in No. 95-258 on August 11, 1995. Pursuant to the Fourth Circuit's decision in *Faulkner II*, Faulkner entered The Citadel on August 12, 1995. On August 18, 1995, however, Faulkner voluntarily withdrew from The Citadel. On September 11, 1995, Faulkner's lawyers filed the instant Motion on behalf of Mellette.

ARGUMENT

In a last-ditch effort to preserve their involvement in this case, Faulkner's lawyers seek to insert into these proceedings – two and a half years after this action was initiated *and at the Supreme Court level* – an entirely new person who will supposedly just pick up Faulkner's mooted petition and proceed with Faulkner's case as if nothing had ever happened. They admit that this remarkable request is prompted by their fear that Faulkner's claims have become moot. Acknowledging that Faulkner "has withdrawn from the Corps of Cadets and is not currently pursuing a Citadel education," Faulkner's lawyers concede "the potential argument that her claims are moot." Motion at 5. *See also id.* at 17a. Faulkner's claims, however, are not "potentially" moot; they are moot beyond a doubt, as demonstrated in our Memorandum Suggesting Mootness of Petition for Writ of Certiorari of Shannon Richey Faulkner, filed September 19, 1995. The United States recognizes this obvious and inescapable conclusion. *See* Brief for the United States in Opposition, at 7 n.4, *Jones v. Faulkner* (No. 95-258).

Mellette's access to this Court is foreclosed for three reasons. First, she seeks by her Motion to be added or to intervene not as a party to this *case*, but as a party to a certiorari *petition* that no longer exists, as a matter of law. When Faulkner voluntarily withdrew from The Citadel, she mooted her petition, and neither Mellette nor this Court can now raise it from the dead. Second, even if Mellette satisfied the requirements under the Federal Rules of Civil Procedure for addition to or intervention in this *case*, she would have to file her own petition for writ of certiorari, which would now be jurisdictionally out of time. Finally, because Mellette's interests in this case are adequately protected by the United States, she does not satisfy the most basic requirement for injecting herself into these proceedings, either as a petitioner or as a respondent.

1. Mellette does not seek in her Motion to be added or to intervene as a party *to this case*. Rather, she "seeks to be added or to intervene as a party to *the two Petitions* presently before the Court." Motion at 4 (emphasis added). This Court, however, no longer has jurisdiction over Faulkner's petition in No. 95-31 since that petition is now moot. Put simply, when Faulkner voluntarily withdrew from The Citadel, there was no longer any live petition before this Court to which Mellette could be added or in which Mellette could intervene as a petitioner.

In none of the cases cited in the Motion has this Court allowed an entirely new person to be added or to intervene as a party to a certiorari petition *after* the original petition had been rendered moot. In *Rogers v. Paul*, 382 U.S. 198 (1965), the case on which Mellette principally relies, new petitioners were added by this Court while the original petition was still live and justiciable; at least one of the original named plaintiffs was still in high school at the time, and his petition for review of a desegregation decision in a class action case thus had not been rendered moot. Nor is Mellette's request supported by *Mullaney v. Anderson*, 342 U.S. 415 (1952). In that case, additional parties were added as *respondents*, not as petitioners. Accordingly, there was no issue in *Mullaney* concerning the ability of a prospective party to rejuvenate a moot certiorari petition.

Not surprisingly, the few cases that are relevant to Mellette's motion foreclose her extraordinary request. The addition or intervention of a party presupposes the pendency of a *live* petition. *See, e.g., United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 163-64 (1914) ("These rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms. In this case the cause of action had not accrued to the creditors who undertook to bring the suit originally. The intervention could not cure this vice in the original suit."). *See also Aeronautical Radio, Inc. v. FCC*, 983 F.2d 275, 283 (D.C. Cir. 1993) (dismissing

prospective intervenor who lacked independent jurisdictional basis for challenge to rule where the court lacked jurisdiction over the proceeding in which intervention was sought); *Simmons v. ICC*, 716 F.2d 40, 46 (D.C. Cir. 1983) (dismissing intervenor when original petitioner lacked jurisdictional basis for petition and intervenor did not file intervention request within 60-day time limit for filing petition for review); *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965) ("It is well-settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' lawsuit.").[1] Because this Court has no jurisdiction over Faulkner's moot petition, Mellette's Motion must be denied

2. In addition to her request to be added or to intervene as a party to the certiorari petitions before this Court, Mellette has also moved in the district court "to intervene as a plaintiff and to be designated as a class representative" in this case. Motion at 4. But even if she could satisfy the requirements for intervention as a party plaintiff to this case, any effort by her to seek this Court's review of the court of appeals' decision in *Faulkner II* is

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[1] The same result obtains with respect to a request, under Rule 21 of the Federal Rules of Civil Procedure, to add a new petitioner. Rule 21 "contemplates the retention of one or more parties in the action and is not a method for substituting the sole plaintiff or defendant in the case with another party." 7 Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1686 at 463. Thus, Rule 21 was not intended " to deal with problems of defective federal jurisdiction." *Fox v. Board of Trustees of the State Univ. of New York*, 148 F.R.D. 474, 484 (N.D.N.Y. 1993), *aff'd*, 42 F.3d 135 (2d Cir. 1994) (quoting *Field v. Volkswagenwerk AG*, 626 F.2d 293, 306 (3d Cir. 1980) (quoting *Kerr v. Compagnie De Ultramar*, 250 F.2d 860, 864 (2d Cir. 1958))). In short, "Rule 21 cannot be employed as a means to create a case or controversy through substitution where one no longer exists." *Fox*, 148 F.R.D. at 486.

now jurisdictionally out of time. Faulkner filed her petition on July 10, 1995, two days before the expiration of the 90-day time period within which a petition could be filed. The instant motion was filed over sixty days after the deadline for the filing of a petition for writ of certiorari had passed.

Just last term this Court reaffirmed the nonwaivable jurisdictional nature of the 90-day limit for filing certiorari petitions in civil cases and rejected an untimely effort to breathe life into a jurisdictionally defective petition. In *Federal Election Commission v. NRA Political Victory Fund*, ___ U.S. ___, 115 S. Ct. 537 (1994), the Federal Election Commission ("FEC") timely filed a certiorari petition, although it lacked at the time the statutorily required authorization of the Solicitor General. The Solicitor General attempted to "cure" this defect in the FEC's certiorari petition by retroactively authorizing the FEC's action. Because the Solicitor General's authorization, however, came well after the deadline for filing a petition had passed, this Court held that the authorization "simply came too late in the day to be effective" and dismissed the petition for want of jurisdiction. *Id.* at 543. The decision in the *NRA Political Victory Fund* case is fully applicable here. For even if Mellette's Motion could somehow be construed as a certiorari petition, it simply comes "too late in the day to be effective." *Id.* at 543.[2]

3. In any event, Mellette's attempt to revive Faulkner's moot petition, and to be added or to intervene as a respondent with respect to defendants' petition, fails to

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[2] *See also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392, 395 n.16 (1977) (affirming decision that district court should have granted motion for leave to intervene for purposes of appealing decision denying class certification; motion was timely in part because it "complied with, as it was required to, the time limitation for lodging an appeal prescribed by Fed. R. App. Proc. 4(a).").

meet the requirements of the Federal Rules of Civil Procedure. Rule 24(a)(2) prohibits intervention of right if the prospective intervenor's "interest is adequately represented by existing parties." In this case, the United States argued in its own intervention motion in the district court that it "seeks the full vindication of the rights of women to equal educational opportunity at The Citadel." Brief of United States in Support of Its Motion to Intervene at 3.[3]

When the United States represents the interests of persons seeking to intervene, the representation of the United States is presumed to be adequate. *See* 7C Wright, Miller and Kane, *Federal Practice and Procedure: Civil* § 1909 at 342. *See, e.g., United States v. City of Philadelphia*, 798 F.2d 81, 90 (3d Cir. 1986). Thus, in *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961), the Court rejected a motion to intervene filed by parties who charged that the United States did not adequately represent their interests in negotiations relating to an antitrust decree. The Court noted, without deciding, that intervention was not appropriate "in the absence of any claim of bad faith or malfeasance on the part of the Government . . . " 366 U.S. at 689. *See also United States v. South Bend Community School Corp.*, 710 F.2d 394 (7th Cir. 1983), *cert. denied*, 466 U.S. 926 (1984). It is similarly well-established that a prospective intervenor who has the same ultimate objective or who seeks the same ultimate relief as an existing party must make a very compelling showing that the party's representation is inadequate. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 884 F.2d 185, 189 (5th Cir. 1989); *South Bend*, 710 F.2d at 396;

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[3] At a hearing held in the district court, the court inquired whether the Department of Justice had "intervened as a Plaintiff intervenor for all other women." Ms. Beber, a Justice Department attorney, responded, "Yes, Sir." Hearing Transcript at 183 (Aug. 10, 1994).

Virginia v. Westinghouse Elec. Corp., 542 F.2d 214, 216 (4th Cir. 1976). Thus, in cases in which a party seeks relief identical to that sought by the prospective intervenor, or in which the United States represents the interests of the prospective intervenor, intervention should be denied in the absence of a clear demonstration of bad faith or of "adversity of interest, collusion, or nonfeasance." *Westinghouse*, 542 F.2d at 216.

Mellette has utterly failed to rebut the presumption of the adequacy of the United States' representation of her interests. Far from showing that the United States has an interest adverse to her own or that it has acted incompetently, collusively, or in bad faith in this case, her only argument is that "the United States cannot represent the interests of individual plaintiffs such as Ms. Mellette before the Court, since the United States has not sought review of the Fourth Circuit's decision." Motion at 3 n.2; *see also id.* at 7 n.4. As an initial matter, this argument says *nothing* about the adequacy of the United States' representation of Mellette's interests as a *respondent* with respect to defendants' certiorari petition in 95-258. And, as the briefs in opposition to defendants' petition reveal, the interests of the United States and Faulkner (and therefore Mellette) are identical. Both Faulkner's lawyers and the United States raised the same objections to defendants' petition and relied on virtually the same authority in support of their arguments.[4]

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[4] In the district court, the United States has stated that it does not oppose Mellette's motion to intervene as a party plaintiff. Although the United States noted the "obvious overlap between the public interest of the United States in enforcing the Equal Protection Clause to the Constitution and the private interest of individual women," it nonetheless stated that "there is no identity of interest between the United States and individual citizens affected by this litigation." Response of the United States to Cross-Motion for Intervention and Renewal of Motion for Class Certification, dated September 8, 1995. The United

In any event, the fact that the United States has chosen not to seek, *at this time*, this Court's review of the Fourth Circuit's decision hardly demonstrates the inadequacy of the United States' representation of Mellette. Mere tactical differences between parties with common substantive interests generally will not warrant intervention. *See, e.g., United States v. Philadelphia, supra.* The United States has not *foregone* the opportunity to seek review of the remedial issues decided by the Fourth Circuit, but has merely argued that review of these issues is premature at this time. Memorandum for the United States in Opposition ("U.S. Mem.") at 7, *Faulkner v. Jones* (No. 95-31).[5] Indeed, the United States has made clear that it agrees that the issues raised in Faulkner's petition are worthy of this Court's review, and it has sought review of those same remedial issues in its pending petition for writ of certiorari in *United States v. Virginia*, No.

States offered no support for this statement, and the history of this litigation flatly contradicts it.

[5] In contrast, in *Bryant v. Yellen*, 447 U.S. 352 (1980), the Court allowed persons who had been represented by the United States to intervene where the Solicitor General had decided to forego an appeal of the district court's opinion. Similarly, in both *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969), and *Banks v. Chicago Grain Trimmers Association*, 389 U.S. 813 (1967), 390 U.S. 459 (1968), intervention was allowed where the parties who represented the prospective intervenors decided to completely forego requesting this Court's review of adverse decisions.

94-1941.[6] Moreover, the United States is currently vigorously contesting the constitutional adequacy of defendants' proposed remedy in the district court.[7]

Finally, as a general rule, where intervention as of right is denied because of adequate representation by a party seeking the same relief, permissive intervention is equally inappropriate. *See, e.g., Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982); *League of United Latin Am. Citizens*, 884 F.2d at 189. *See also New Jersey v. New York*, 345 U.S. 369 (1953). To the extent, therefore, that Mellette seeks permissive intervention, her motion should be denied for the same reasons discussed above.

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[6] *See* U.S. Mem. at 6 (Faulkner's certiorari petition "presents an issue of importance calling for this Court's review."); *id.* at 7 ("This Court will . . . have an opportunity to review and decide" the issues raised in Faulkner's petition, "because the same issues are presented in the United States' pending petition for a writ of certiorari in [*United States v. Virginia*], No. 94-1941.") (footnote omitted).

[7] For this reason, Mellette's claim that a denial of her motion will result in "needless and wasteful" litigation is meritless. Motion at 4, 5. If her motion is denied, there will be no need for her to relitigate the issues presented in this case; the United States will continue to represent her interest in gaining admission to The Citadel.

CONCLUSION

For the foregoing reasons, Mellette's Motion should be denied.

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